

**TRANSCRIPT OF CONFERENCE HELD AT
EPA OFFICES, 290 BROADWAY, NEW YORK CITY, NEW YORK
APRIL 4, 2019 AT 3:00 P.M.
REGARDING EPA’S REQUEST FOR ACCESS TO
PROPERTY OWNED BY CANNISTRA REALTY, LLC**

In attendance was attorney Nicholas M. Ward-Willis, Esq. for Keane & Beane, P.C., for Cannistra Realty, LLC. Vic Cannistra and Andy Cannistra, principals of Cannistra Realty, LLC participated via telephone. EPA was represented by Margo Ludmer, Esq. and Jim Doyle, Esq. There is also a second year law student intern, Sarah, also present who took notes. The Regional Administrator’s designee to confer on the matter was Gerald Burke, Assistant Regional Counsel, Office of Regional Counsel.

JD:	Ok, Jim do you have any objections.
GB:	I mean it’s not a hearing and in the past we have not allowed people to be bring in a stenographer but I mean if you are just...I don’t think we have any objection.
NMW:	Okay, thank you.
GB:	First of all, good afternoon, my name is Jerry Burke. I’m an Assistant Regional Counsel in New Jersey Superfund Branch in the Office of Regional Counsel. I will be conducting the conference today. I have not had any prior involvement in this matter or in the development or preparation of the Order. My job today is to listen to what everyone has to say and then confer with Angela Carpenter, the Acting Director of the Emergency and Remedial Response Division who will decide whether any modifications to the Order are necessary or appropriate. There is a sign-in sheet circulating. Andy and Vick, Nick has already signed you in and we’ll sign Dan in and subsequent to the conference, we’ll make arrangements to email it around. So Nick I think the ball is in your court.
NMW:	Thank you Jack. Thank you everyone for attending today and providing us this opportunity to confer with Mr. Burke so we can express our concerns both procedurally and substantively with our objections to the EPA’s Order. Let me start by saying, we’ve uh, I think we’ve had a fair process where each side understands where we are coming from and I appreciate the cooperation of the agency so the fact that we’re at a disagreement I don’t think is a reflection on the lack of each side trying to reach an agreement and we appreciate that but we are here today because we disagree with the procedure that the EPA has taken with respect to accessing my client’s property Cannistra Realty. Vick and Andy are principals of Cannistra. As you saw in the Findings of Fact, the property is a half-acre improved with a building and parking lot. We have not interfered with access, we’re not objecting to access. We have concerns with the access in terms of how it impacts the tenant’s use of the property which as landlord we are responsible for and we don’t want to be in breach of our obligations and

	we've tried to find common ground with the agency but have not done so. So before I get to the substance...
JD:	Can I interrupt you a second.
NMW:	Yes
JD:	As I understand it's a car dealership?
NMW:	Correct, yes.
JD:	Okay. Thank you.
NMW:	So I have two procedural concerns about how we got here and where we are and with the Order I should say. So the 1987 policy that the agency is relying upon _____ July 5 th provides that all Administrative Orders for access must be concurred on by the Office of Enforcement and Compliance Monitoring prior to issuance. When I went through the Administrative Record and I read the Order itself, I don't see that in there and as my kid's tell me, I make mistakes, so perhaps I missed it but I don't see that there is any evidence that there was the concurrence by the Office of Enforcement and Compliance Monitoring prior to the issuance that is present in the Record. The other procedural issue that we have with respect to this matter...
JD:	Wait...
GB:	I'll let him follow Jim and I will let you respond there.
JD:	Go ahead Nick.
NMW:	The second procedural concern has to do with findings of fact. There are a couple of key facts that are missing here under the statute the Department certainly has the ability under Section 104(e) to enter the property at reasonable times and that's if you've read our letters, that's where the dispute becomes as to reasonable times and there is nothing in the findings of fact that would allow the fact finder for issuing the Order to make a determination as to whether what is a reasonable time and I say that because there is nothing in the facts that addresses what is the property being used for. Now there is correspondence but there needs to be a specific findings of fact to make that determination as to the reasonableness and that is lacking in this Order which I think is fatal to the effectiveness of the Order. For example, there is nothing in the findings of fact that talk about the current use, when one reads the findings of fact, it could be a vacant property, it could be a baker, it could be a restaurant, in fact it's a car dealership, it's a half-acre. It's a car dealership which is very active, it has intense hours of use. There are customers, there are vendors, there are

	employees and none of that has been taken into account by the fact finder in issuing this Order and I think that's something that Jerry, when we are conferring with you, that needs to be taken into account and it wasn't here and therefore this Order itself is just defective because of that. There is just no findings of fact. There's solely one paragraph, paragraph 4 that talks about the property and again it says half acre in size and it's a building and parking lot located on the subject property. So procedurally I don't think the findings of fact are sufficient to support the Order. Substantively, and if you have questions please interrupt me.
DAVE:	Yeah, I'd like to interrupt you there. Uh, so how does the fact it's a car dealership impact the EPA's ability to access the property as opposed to a vacant piece of property. For example, I'm going to ask EPA the same question. Are the activities that are to be conducted, are they drilling through your floor....
NMW:	So that's what I was going to address when we get to the substantive stuff and we are actually there now so this is a good opportunity to. So substantively, we have again, we've not said don't come onto the property and there are three principal activities and I should say we had a number of demands initially that were rejected and we have withdrawn from our request. Our request principally now comes down to being provided with insurance that shows that the property owners and the tenant are named as additional insured's by the contractor. That was not initially offered, we did want worker's compensation, that's been explained to us that's not provided so we're accepting of that and agreeing not to request that but we do want to be named as additional insured's both the property owner and the tenant.
DAVE:	Has that been addressed?
ML:	Yes, we have said that we are willing to do that and we actually showed you a sample additional insured certificate of insurance for the general liability not for what _____.
NMW:	Right, I think in the last go around of the letters it was deemed to be denied because we had that worker's compensation category part of that so you decided it was denied but I do agree that if we..as we removed the worker's comp. they have provided the certificates of insurance that would name as additional insured. I don't know if they named the tenant as well but I think that would be provided, correct, that both the landlord and the tenant would be named. So that's a non-issue.
DAVE:	Thank you for the clarification.
NMW:	So the work proposed consisted really of three discreet tasks. The placement of the radon canisters during a 72 hour period, that's never been an issue as to the placement of the canisters. The second is the performance of a radiological survey which consisted, as you may well know, of a buggy, a baby carriage going across certain aspects of the property. No objection to that, it's the issue with

	the hours of access and I'll get to that in a moment. The third is the collection of approximately ten samples and I understand the exact number of samples would be based upon the radiological survey and the observance of the conditions in the site, so that's understood. Let's just say four of those are proposed to be within the parking lot where the employees park, where the customers walk, where the vendors come in, where the cars are serviced and sold and then there are six around other aspects of the building but outside of that parking lot area. Again, no objections to the caking of those.
JD	Nick so 10 soil borings, 4 in the parking where the employees park and 6 elsewhere around the building. One of the things I asked before, inside the building...are they drilling...
NMW	There are none proposed to be drilled inside the building. That has been represented to us. I presume that could occur given the caveat that they reserve the right to do whatever sampling deemed to be necessary once they are out in the field but that has not been brought to our attention. I don't know that's the intent. Indicating that's not the intent.
JD	Yeah and Nick we're not in a rush here so don't feel under any time pressure to you know _____ as long as it takes.
NMW	Great, I tend to talk.
JD	I saw in the correspondence back and forth, it was in the record, that there was...I believe your clients wanted to reserve the right to talk about the soil borings later, after some of this testing was done. EPA's response I saw was that we know we are going to do the soil borings, we don't want to have to remobilize, is that an issue still?
NMW	I think it's a reasonable request. We've been told no. We've been trying to find the common ground so we've been willing to concede on issues. In fairness I don't think our view is that the EPA conceded but to answer your question, no we are no longer looking for it. Before we thought phasing would be the least intrusive. We're trying to avoid going to Court and having issues so we thought we would allow that to occur if it could occur on hours that are reasonable. So to answer your question, no we're not seeking that they first do the radiological survey work before they proceed to the soil sampling.
JD	So if I go back and look at the correspondence, let's say August 2018...
NMW	November was the last letter that set forth...
JD	Okay, November, I'm gonna say it looks like August, November you're pretty far apart. I'm getting the impression that you're not on common ground yet but you closed the gap. So I guess what you could tell me is what are the outstanding issues from your perspective. For example, we talked earlier and you said that EPA, I'm not sure if this was not willing to add you as a named insured or have the contracts as your name insured. I understand that's been

	resolved so I'm trying to get to...it looked to me like in the August, November correspondence there were out of 10 issues maybe a dozen. Are they whittled down to 3, 4, 5 and if they are, if you can help me, tell me what they are.
NMW	And so when you say the gap's been closed I would say the gap's been closed because from our perspective we've walked closer to the EPA, in fairness. So the issue that remains I would characterize as one issue. It is the reasonableness of the hours of the time of access. So it is the hours the work would be performed. To give you...right because we are not objecting to the scope of the work, we are not objecting to...we'd like to see it done as quickly as possible so we're objecting to both the hours and the number of days. We have offered to pay for the additional time incurred by both EPA and its subcontractors to have that work done. To give you the sense of the background, the facts of the property, it is a Tesla dealership, the busiest one on the Northeast is what they tell us and in addition to its service facility, it's also its sales facility so it is where customers will come to view, purchase, have their car serviced and collect as I said the new vehicle and the employees park on-site as well. There are vendors who will bring supplies and material to the property. It's a tight site as you've seen. The employees park on-site. It is probably Vic and Andy and how many employees, 10 to 20 on-site.
VC/AC	I would say at least that, yes.
NMW	Ok and I have some pictures to show you that demonstrate the site is always occupied and the hours....
JD	The working hours?
NMW	During the working hours.
JD	And what's working hours?
NMW	Yep, so basically it's 8:00 a.m. to 6:00 p.m., Saturday through Sunday. Sunday it is 11:00 a.m. to 6:00 p.m. So it is 7 days a week and the service and sales room have different hours so they overlap but that is of course what you would expect. Service opens first and closes before sales and sales closes last so that's why I say 8:00 a.m. to 6:00 p.m. except on Sunday when it is 11:00 a.m. to 6:00 p.m. and again it's a busy site, we've been out there...I've seen it myself, my clients first told me that and when I looked at the hours and I've looked at the photographs, it's a busy site. So our thoughts were that the concern is if a drill rig is out in the middle of the parking lot, potential damages to the cars, potential interference with cars being delivered and serviced and they will be there 2 to 3 days and we also, if it is done during off hours, the employee's cars won't be there. It gives greater access to the site so that there is not the space they want to look at, that EPA wants to look at, won't be covered by the vehicles. Jerry, it is equivalent in my mind and a little bit of background also is if you've read the materials, I'm sure you have, this is not as though this is a spill

	<p>that occurred yesterday and needs immediate response. It's been investigated by EPA for 40 years, the sampling that leads to the need to come onto the site was performed in 2015 and 2016. My clients were not approached until May 2018 so you well know, based upon your experience, what I understand of what you do...contractors work after hours. We see it all the time in the construction business. I represent private parties and if there is a spill, they work nighttime hours and our clients are willing to bear that additional cost so as not to interfere with the tenants operation at the property and I know contractors work overnight. We suggested that they could do the radiological survey on a Saturday night when it closes at 6:00, get it done before 10:00 p.m. Put the lights in, people work under the lights and get it done and then come back and do it on a Sunday or maybe come back and work overnight on Saturday and Sunday night so that the work is completed by Monday or maybe it needs doing the radiology on a Saturday and then coming back and doing the drilling the following week on a Saturday and Sunday and again our clients will bear that additional cost. So I don't agree that we have impeded or restricted access, I think it all comes down to the statutory requirement of whether it's at reasonable hours and we would submit that to Jerry for you to reach determination or the administrator to reach a determination again _____ what's reasonable. For example, you talk about going and taking sampling during a restaurant at a reasonable hour wouldn't be during their dinner time would it? If you're talking about a pool that needs to be sampled, you wouldn't take the pool out of commission during the summer months. So our contention all along has been, we'll work with you but work with us and we'll pay for it...let us pay for it but don't tell us that we've got to have this done during hours that are not safe for the customer's sake or the workers who will be out there and interferes with our operation. I think that, to answer your question, that's what it boils down to is the reasonableness of the hours. That's the sole issue that's there.</p>
GB	That's the sole issue that remains, the gap between EPA and your clients?
NMW	Vic and Andy you would agree?
VC/AC	Yes, we would agree. The only thing we are asking for is reasonable hours for this work to be done. To not interfere with our tenant and for them to get upset and just to prevent any problem with customers or employees who are working on the site.
GB	You guys? I'm curious Jim if you could just address this issue..
JD	I'll take care of the first question alright.
GB	And also address this issue about, my guess is it's not as simple as it sounds for them to bear the additional cost that we would incur. That's just my guess but...

JD	You are correct that it is an inconvenience to have to determine the additional cost in our...you know the government, as efficient as it is but we have conceded that so that's not...the issue of them paying the differential, the delta, is not an issue. It's really the time not the dollar amount. So I'll let Margo into the details...
ML	I would just add that we have already agreed to potentially doing the work on a Saturday or a Sunday at the expense of Respondent but during
GB	The additional cost...
ML	The additional cost.
JD	A Saturday or Sunday but not after 6:00.
ML	Exactly.
GB	Is there a safety concern?
JD	Dan is on the phone and Dan has expressed a safety concern about working at night under the lights. Um, one question that I guess I would have for Dan is, is there a safety concern about doing the buggy during working hours because, you know, Nick is sort of...is laying out a scenario where their cars are in the parking lot and we are not asking them to move a bunch of cars to do this work. As far as we are concerned all this work can be done during a regular business hours and we're not gonna and the drill is not what you're thinking of from Oklahoma.
NMW	_____
JD	Well maybe Dan can answer that question but we are not saying in order for us to do the sampling you must clear the parking lot of all the cars and...
ML	I think there is definitely the potential that there could be a car in our way.
JD	Yeah.
ML	So it's not, you know, no cars will need to be moved but certainly not a clearing of the parking lot.
JD	Alright let me go back to...
NMW	I'm sorry, do you mind if I...just because I should mention...
JD	No, not at all.
NMW	I wanted to show you photographs.

JD	Go right ahead.
NMW	Beforehand so I thought it would be beneficial for you because the photograph that is being provided in the work plan is taken off hours when the employees aren't parked at the facility during the day so here's an example of a photograph of the property taken from the street and as you can see....
JD	You guys have seen this?
NMW	No they haven't seen it.
ML	Not yet.
NMW	I'm happy to share it. I'm sorry...this is just another view looking into the parking lot. If I had my drone out there I would have taken one above ground, above the air that would have shown it ... and again there are more that show that perspective that...I think this is just another one. Half acre is small and half of it is occupied by the building and so...
GB	By the way at any time if anyone feels the need to confer with their client privately, just tell me and we'll take a break and talk to them.
NMW	I can certainly provide copies. I apologize I didn't bring them.
JD	You wanted me to tackle the first question.
GB	Um, I would let me just ask clarification. So as I understand it the gap is reasonable hours. Does the reasonable hours gap apply to each activity. For example, the canisters.
NMW	No. Vic and Andy correct. Come in and take the canisters and put them in at a time that's fine.
VC/AC	Fine, any time for those is great.
NMW	The buggy. I think yes.
VC/AC	Actually, we would prefer off hours just because the lot will be more clear and my understanding is the buggy is only going to take one to two hours so if the shop closes at 6:00 for example on Saturday or Sunday, it's gonna be light out until 8 or 9 o'clock. We are moving into the longest daylight hours of the year, why not just do that one evening, assess your buggy results and then you can do the drilling the next day or overnight.
GB	Okay, I don't mean to minimize your concerns about the buggy but the real gap is on the soil borings. Again, I don't mean to minimize Andy or Vic the buggy at all I'm just.
NMW	So the gap Gerry also is that we've been told the buggy can occur on a separate day from the soil boring.

ML	On a separate day?
NMW	Well, my understanding is that it would make sense to do the buggy, right you could do that from 6 to 8 o'clock and then come back and do the soil borings. If you are starting at 6:00 after hours we've been told that the soil boring would take longer right?
ML	Yes definitely the soil boring would take at least 2 full days to complete.
GB	But do they have to occur in immediate sequence?
JD	Dan are you on the line?
Dan	I am.
JD	Can you shed some light on the buggy situation. Whether you agree that it's a two hour procedure and maybe point out your view on starting that at 6:00 on Saturday or Sunday night.
Dan	Sure. The buggy is essentially a baby stroller that we attach a number of equipment to its uh sodium iodide, gamma probe that we will push across the site, it's connected to a laptop, it's connected to a gps device and transmits to another station and then it tells us...the gamma probe gives us a reading of any gamma rays that we are picking up through the ground surface. We use it as a screening tool to help guide our sample locations. It will take a little while to set up and make sure it is working properly and then it will take a couple of hours to go across the site and make sure we are getting proper readings as well.
GB	Dan this is Gerry, so and how do you...when do you mark the locations where you want the borings after you walk the entire property or...taking the buggy across the entire property or...and then you say we're going to do here, there and over there?
Dan	Yeah, pretty much. I'd like to run the buggy, look at the results and then make the determination as to where I'd like to put the sample location.
GB	Okay and what's the time differential between running the buggy across the property and determining the boring locations.
Dan	Probably a couple of hours.
GB	So is there any need to do it immediately after or for example, can you do the buggy on Saturday night and then come back on Sunday night and put the soil borings in, on Sunday just say Sunday, not night?
Dan	Yes it is feasible to do that. I just have to make sure we'd have a contractor available to do everything that we would need to do.
GB	So you don't need to do them in sequence on the same day is what you are saying?

Dan	No they don't need to be done on the same day?
GB	Can you do the buggy with cars in the parking lot.
Dan	Yeah, we've done it on the adjacent site with a lumber yard, active lumber yard there.
GB	Okay so it's not an issue for you at 10:00 a.m. whatever day of the week.
Dan	No
GB	To be doing this and is there danger involved for people walking in the parking lot if you're moving the buggy around.
Dan	No it's literally a baby stroller that we push around. We'll be wearing safety vests so people will see us as they drive in.
GB	So they don't hit you.
Dan	If we stop for a long period of time we'll have a couple of cones set up so people see us with that. We are safety conscious in our work.
GB	But that's so that you won't be hit by a car not because of radioactivity, correct?
Dan	Exactly yes.
GB	Thank you.
JD	Okay that was very helpful to me, thank you. So Nick you raised the issue of, I think we've clarified that soil borings don't need to be done immediately, after the lack of a better term, the buggy is pushed across the property. Alright. So we're really...again, I don't mean to oversimplify things or minimize things but we are down to the soil borings. So again...I think what you are missing is the agency's position has been we are not going to do this at night so the buggy going across the property is not a problem unless it is at 6, 8 or 10 o'clock at night. So we're not agreeing to condition the work at that time of night or any time of night frankly. After hours.
GB	The dealership closes at 6:00 p.m. every night.
NMW	Correct, even on Sunday.
GB	That seems to me to be unusual for a car dealership.
NMW	No, I mean I have represented car dealerships. It's not unusual.
GB	On the weekend, people shop for cars.

NMW	Sundays is the unusual part here because typically Sunday most dealerships are closed but it's not unusual. Right _____ people will come off work and shop cars, typically they actually open later, _____ Honda dealers for example.
JD	Our position is there is no impediment to us certainly doing the baby carriage during business hours. There's no risk to any customers, there's no...we're not gonna inconvenience them by saying move all the cars to one side of the parking lot, you know which understandably could be an inconvenience for them. So it is a convenience, I believe you know it's been stated that there's a concern that the tenant will leave, break the lease and leave if...I mean that's an issue that I don't think has to do with a day of inconvenience or two days of inconvenience. It's a separate issue perhaps with regard to you know radioactive results, you know, low level radioactivity but it... my point is that the request for doing this overnight is not because the employees are in danger it's just you know perception.
NMW	I would completely disagree.
GB	Okay. So Jim your perspective is that um the presence of using contractors in safety vests or safety gear may impact their tenants.
JD	No I am just gonna say what is in their minds but if they were saying...if you were saying please do this at night because this activity will injure our customers, employees then that would be a serious concern to take into consideration. I don't know why they are asking us to do it at night. It has come down to 6:00. Earlier it was, the request was even later and going through the night and with our contracting mechanisms we don't typically...I think we've been reasonable and flexible to the extent that we are now talking about Saturday and Sunday. I mean Sunday is not a...Dan gone will you know miss his family for the weekend going up there and spending the night in Mt. Kisco waiting...you know... so we are being reasonable but it is really the after hours at this point.
GB	And you think the contracting mechanism can be adjusted to provide for that additional expenditure at their expense?
JD	Dan has looked into it and has determined that we can get the contractors to work on Saturday and Sunday. We have yet to get a dollar amount. You know, we made it clear we wanted to be up front because if we go through this whole process and we agree on something and then our contractor says it will be five times more expensive than \$50,000 for you to...you know... your client I understandably would like to know that information, I'm sure. So we haven't gotten there to get an estimate of what the additional costs would be but we have concluded that night time versus day time weekend work is not gonna work for us.
NMW	And I haven't heard or don't understand why the night time won't work. We know night time work occurred. It's arguably in my view safer because there is no other activity going on the site and it would not interfere with vehicles

	coming in so if for example one of the areas where Dan wants to take a soil boring is outside the service bay, there are three or four of them, or outside the parking entrance, that interferes with the use of the property. Those could be put in overnigher and after hours, again we would pay for that. It's not unusual for such work to occur and I don't think safety is an issue whether that work is being done at night time. I would argue it is safer to be done at night time. The lighting conditions are just as good if not better.
GB	I'm not gonna ask either of your clients direct questions so I'll ask it to you but obviously if you want to turn to Dan or talk to... When is the work contemplated to be done?
JD	Last May.
NMW	Sometime within 40 years I would respond but...
ML	Do you mean what would be the start date in terms of day of the week or...I mean ideally we would come in on a Monday.
GB	No I mean what time, is it gonna happen in June, May or June?
JD	Next week.
ML	Yeah, we'll need a couple of weeks to get our contractor.
GB	Okay, I noticed it's a little lighter out now than it was in December so...
JD	But it's the time of day for the contractor, it's not the light in the sky. If you say you have to work at 10:00 at night, if you're in northern Alaska where it is night all night, it's still you are working at 11:00 at night and our contractor is not gonna...
GB	I assume there is some premium associated with them working at night so, that's my guess.
JD	Well, they're gonna pay the difference. So the premium is not...
GB	Again, I'm not gonna ask Dan a direct question but I would like to know what the difficulties are of installing the soil borings at night and if you guys want to take a break and go talk that's fine.
JD	Well we certainly have asked Dan this question so I don't know if you want to answer of if you want to ask Dan to explain it. EPA has the ability to work 24 hours a day when there's an oil spill or whatever the case may be but the flip side of that is I would say there is no reason, there is no safety reason why we shouldn't be doing this on a Monday morning for three days and if they said we are closed on Sundays, please do it on a Sunday, notwithstanding the additional cost, we might very well say fine we'll start on Sunday but it's gonna take 2 or 3 days and we were asked to do it in a 6 hour increment and come back a week

	later on a 6 hour increment and come back and we said no we want to mobilize once and be done...and so turning it back around there's no justification for us working in the dark at night or in the light at night. If we want to wait until June 21 st , that is also an issue, we've been trying to get in for a while but as far as the 40 year thing, I mean we haven't been looking at it for 40 years, they keep saying that but...
NMW	It's in the Findings of Fact.
JB	No it was looked at 40 years ago and it has not been on anyone's radar until 2015 when a different kind of survey...that's irrelevant. We would like to get in there and take a sample and we don't want to wait 6 months just because the days will be longer.
NMW	No one is suggesting 6 months given where we are now.
JB	My understanding right now is that the plan is to install a total of 10 soil borings but it's possible that could change based upon the buggy trip.
ML	Well Dan are we committed to 10, I know the location of the samples will change. Is it possible that we might need additional samples?
Dan	It's possible but I wouldn't suspect we would put in more than 15. Depending on the results of the gamma survey.
GB	What's the depth just out of curiosity of the _____.
Dan	On the other properties we've gone down to 8 feet.
NMW	And Tara we suggested at one point which was not accepted was do it in phases, do the canisters and do the radiology because that would then give you the information so you could then come back and we could work on a reasonable plan to then do the soil borings because maybe if there are 10 or 15 in different locations then we can work with them to (a) make sure cars are not there or (b) to do it at reasonable hours and stage it appropriately but that's not acceptable.
Tara	Reasonable hours meaning at night.
NMW	Yes
JD	And our definition of reasonable hours is the day.
NMW	And that's what this dispute is about. I think Gerry recognizes that. It's given the use of the property what is a reasonable hour and given respective concerns.
JD	Of our 1,000 superfund sites in the region, people say only work at night you know, every business...
NMW	But that's not what you're approached with.

JD	We are approached with you asking us to work at night
NMW	Correct and that is what we are concerned about, not 1,000 other sites.
JD	No if others ask then we say not to somebody else like we did to you and the additional cost and you know and there is no reason to do it at night.
NMW	Well that's where we...
JD	Except for...
NMW	No it's not for convenience, it's for safety. I think that is another issue here. So...
GB	Marla how long does it take to install each one of these soil bearings?
ML	Dan you can interrupt me if I am incorrect but I think it's a couple of hours per soil boring and each one has to be...each time a soil boring is taken the equipment has to be cleaned before you can move on to the next. To make sure there is no cross contamination. There also needs to be a clearing of utilities before that soil sampling can be done. Is that accurate Dan?
Dan	Yeah that's an accurate statement. I'd like to just make one comment. When we have a conference in our office and I ask the contractor how long each soil boring would take, we were told less than a half hour per boring so I don't know how we got to 2 hours per boring.
GB	Is this Vic or Andy?
VC	This is Vic speaking, Vick Cannistra.
GB	Okay, thank you. Dan are we talking about the actual action of advancing a boring 8 feet or...
Dan	Yeah the actual hammering of the g probe can take 5 minutes to 30 minutes. It's all the other stuff that goes along with it. It is the cutting open of the tubes that are associated with the g probe, it's the identification of the sample, it's the screening of that sample with a gamma probe, it's the collection of that sample following proper protocols and procedures and then the reinsertment of the unused soil back into that hole location and then filing in the hole with clear soil. So it's not you know 10 minutes or 20 minutes or 30 minutes, it's up to an hour or two per location because of all the other details that have to go into it.
GB	Alright can we go back to _____.
JB	Thanks Dan. So the 32 year old guidance now document from 1987 is guidance I should explain is just agency policy. It's not a requirement but subsequent to the 1987 guidance delegations which occurred in 1988 I believe, I'll have to confirm the date, the delegation said that the regions had to confer with

	_____, I'm sorry a part of headquarters that hasn't existed for 20 years and for the first number of orders so that headquarters would be comfortable that we were doing it right. That occurred between 1988 and 1990 and in the subsequent 29 years we had not...there is no requirement that we confer with headquarters when issuing access orders so to your point that we didn't get _____ whatever occurrence on this is...hasn't been a requirement for some time.
NMW	I can't speak to that I just know that's the guidance that is relied upon in the order so to rely upon some of the language in the guidance and not others is a little disingenuous, with all due respect, I think, and that should be...you know either then the corrected guidance should be updated...
JD	The front of it says no parties can rely on this guidance for any rights, you know, no parties other....These things change over 32 years. There is no Director of _____.
NMW	And that's my second argument that...
GB	Then your second major procedural issue Nick was no recognition of its _____.
NMW	Insufficient background to support the issuance of the order.
GB	So what I was saying earlier about you disagree with what is a reasonable time, but certainly without there being a necessity, 9 to 5 is a normal working hour and it is a reasonable time or 8 to 4, whatever and 8:00 or 9:00 or 6:00 on Saturday and Sunday is not a normal reasonable time so our guidance which to the extent there has been no superseding guidance to change the policy on if we're denied access. I don't know how you can say, you haven't said we can come on, would you agree with that? You have not said come on Monday or Tuesday, so if you haven't let us on the property.
NMW	But we have
JD	You can't say we have allowed you access but we just can't agree to when. They have denied us access and is the...are we being unreasonable? We're moving it to Saturday, we're doing many things that frankly we have never done before in my knowledge of doing a....agreeing to a Saturday, paying overtime as compensated by your client. I think we are being very reasonable but there is a point at which it stops.
GB	I understand the agency's position to be that a consent for access with conditions is considered to be a denial of access so that happens in our branch too. I thought though Margo you said that there was some willingness to do something on the weekend.
ML	Yes, there was a willingness to do work from 8:00 a.m. to 6:00 p.m. Saturday and Sunday so that was an accommodation that we were going to make at the expense or additional expense of....

GB	Alright so that is overtime assuming.
ML	Yeah
GB	Nick, that doesn't cut it for you.
NMW	Busiest day of a car dealership is Saturday. So doing it on a Saturday doesn't quite cut it. We thought Sunday we could work with if we started on Saturday and did work into the evening and so in my mind Gerry the way this would make sense to work is come and put the canisters in whenever you want, come in on a Saturday after 6:00 and stay until whenever it takes to get it done to do the radiology survey, then you call for your site utility work to get done so that it is marked out, that can occur during the day, it's just a site utilities being marked out. Then they are prepped to do the soil work. They know where the utilities are, they know where to drill the points and then the discussion is when are they drilling those holes. If you look at the sample map, that's part of the work plan, there are points within the parking lot, those are the ones that should occur during the off hours. Those can occur Saturday into Sunday. They can occur Sunday in the evening. They can occur at 6:00 a.m. on Sunday and finish at 11:00 a.m. on Sunday. The ones on the perimeter, you have more flexibility because they are on the perimeter. I can't argue that the ones on the side here interfere with the customers and I am not, I am arguing that these do for a variety of reasons I'm not gonna repeat. So I think there should be some willingness to do that work, again at our expense and it makes sense.
GB	Okay let me ask you this. So from your client's perspective the worst time would be on a Saturday. Probably the worst time would be a Saturday and you know a little knowledge is dangerous but the worst time would be the last Saturday of the month. That would be the worst time.
VC/AC	Probably.
NMW	Probably yes
GB	And the best time would be the first Sunday and Monday of the month.
JD	What does the end of the month....
NMW	That's because people want to get their commissions in so they want to get...
GB	They sell a lot of cars...that's the best day to get a good deal on a car as I understand it.
NMW	I think that's right.

GB	So your least...to be practical the least business you have going on is on the first Sunday, Monday and Tuesday of the month, would that be correct?
NMW	Vic and Andy do you know?
JD	They are the landlords they are not...
NMW	Right but their office is nearby and they know the facility so...Vic and Andy do you feel qualified to comment on that?
VC/AC	You know it is hard to say, it's probably accurate. Most sales auto dealers are trying to get all their sales in by the end of the month to get their bonuses or whatever so there probably....
NMW	But it's also a service facility.
VC/AC	Beginning of the month and earlier part of the week.
NMW	But it's also a service facility
VC/AC	And you know keep in mind that our position really is here. We are trying not to interfere with the tenant. I mean it is not fair to the tenant that they are paying rent there and we're gonna basically take over the lot and there's gonna be a drill rig that is going to be track...with tracks rolling around the lot with these cars. Tesla cars go from well there's a new \$35,000 model out but some of them go for \$140,000. I don't see why we should be interfering and upsetting our tenant over what is the landlord's problem so to speak. That's why we're looking for off hours here and I think it's a reasonable request. I really haven't heard a good explanation as to why the EPA cannot work at night other than you kind of just don't want to. If it was an emergency you would work at night so I think it's a reasonable request that we are adding.
JD	But the cars are gonna be there at night. Correct. Are you going to get all the cars out of the parking lot for us at night. I mean I know there will be fewer.
VC/AC	There are a lot less cars at night when all the employees leave and all the customers aren't there and nobody is charging their Tesla's there is very few cars there because what they try to do is they try to lock a lot of them up in the building and there is also a fenced in area where they lock them up. So you certainly would have better access without the cars there. I would think you would want to be there off hours. The lot is packed all the time. We've been told by the manager there they are the number 1 sales center in the northeast so they are busy. I don't even know how you would get that rig around the property at any time during operating hours. They also are not allowed to park on the street there they get ticketed if they are not registered cars yet so they can't even move them out on the street. I have a very good relationship with the manager and you know maybe if I knew what day then I could coordinate with him, maybe he could put more cars in the service center or move some off

	lot. I will try to work with him and work with you but I'm trying to decrease the interference of the tenant as much as possible.
JD	Alright so through your counsel, I don't know how much this work would cost to do it off hours, let's say it's an extra \$50,000, um have you spoken with your tenant about paying your tenant \$50,000 for the inconvenience of us doing the work.
	That number I was exaggerating. I don't know if it would be anywhere near \$50,000.00.
JD	Have you spoken to your tenant. I understand you are concerned about your tenant is gonna be inconvenienced. Inconvenience can be compensated.
VC/AC	Well that's why we're willing to bear the extra cost for this so it doesn't interfere with the tenant. That's why we're gonna pay for it. Why would we want to pay for it otherwise.
NMW	I
JD	I don't think the tenant will shut the doors but what the tenant might very well do is if we go ahead during the day, at the end of the month when he submits his rent check he's gonna say and we've deducted \$3,500.00 for loss of business or inconvenience for the work that was done.
GB	Most of this work comes down to money so if EPA feels the need to do the work during the day and that is troubling to the property owner and the tenant there is a way for that to be compensated. Now you guys can...you offered to pay for EPA to do it, another way is to compensate the tenant for it. It's not my call to say.
NMW	Right. I think Gerry that overlooks the interference and just compensates for the inconvenience. It doesn't address the other issues of the interference with the sales. You're still going to have the work being done during the hours so...
ML	A lot is being made of interference of the sales but Dan can you describe what the soil boring mechanisms are and the size of the equipment and sort of how we would go about ensuring that we weren't interfering.
Dan	Sure I mean a standard g probe will be a track mounted thing, it's about the size of a lawn tractor, maybe a little larger than that depending on the unit that the contractor would show up with. There are ones that are much larger but we would, you know, in the contract that we award we would stipulate that it had to be a smaller machine to navigate through tighter spaces especially around the back of the building down that little green grassway that is there behind the fence or between the building and the fence that's there. So it would be a small machine. It only goes about a half mile an hour so it doesn't go very fast. It would be a slow deliberate process to move it from one place to another place. We would have people with flags or people with safety vests to make sure no one would back into us or hit us if they were going across the parking lot. It is also a very loud machine. It is something such as a jack hammer that hammers a steel pipe into the ground. Doing that at night would upset anyone who is

	nearby and there are residences within about 200 feet of the facility. So it's like I said it's not a big machine but it is a very loud machine.
ML	And Dan no one will be in _____ suits so there will not be any gear that suggests that this was a radioactive site or anything that might scare people away.
Dan	No, if it is raining people might wear a rain suit but if it is a nice sunny day, there is no reason for us to wear any sort of a _____ suit or moon suit or whatever you want to call it. They will be wearing gloves just to keep the soil off their hands but they would wear that anyway.
GB	Nick, do you have anything to add.
NMW	No I think we've addressed everything. I think it comes down to the reasonableness of the hour of the work.
GB	Jim, Margo do you have anything...
JD	_____ it is in the order I'm sure but....as far as questions of....I'm hesitant to say that the order as issued is invalid because we're not willing to work at night. I mean we are here to discuss why this order is legally not a validly issued order and if the position is because we won't work evenings, the EPA does not have the authority to issue this order that troubles me a great deal. If we're talking about accommodations and how we can do it, we've been doing that since last May and we can talk about the duration between letters and so forth but the fact of the matter is that since last May we have been trying to work out an opportunity to get in there for two days of work and we have not been successful and that's why the order was issued and I think we've been reasonable and I think...I will certainly concede that your client has been reasonable as far as there were many issues that we worked out. But we are just at the crux of the issue and we're as far as we can go.
GB	Jimmy there is one open issue that I am concerned about and that is...so we have an offer from Cannistra to pay for the additional costs but we don't know what they are so I am hesitant to go to the director with this offer to pay additional cost when we don't know what the costs are. If the EPA comes back and says it's \$60,000, I mean is there an up limit on what Cannistra has offered.
NMW	I can't answer that in a vacuum. Also I think for them to get...we need to know the hours the work is going to be done. You are hearing from us we prefer that work be done from a 6:00 p.m. to a 1100 p.m. or 12 midnight or through the night.
JD	And Dan can't answer to the cost unless he knows what the hours are because...
NMW	But the contractor could come back with a...sorry to interrupt you...with a scenario of (a) here it is for these types of hours and (b) here it is for these types of hours. There are a couple of different ways you could slice the onion and I will point out and I don't want to quibble with Jim but we said two days of

	work and the order says 4 to 6 days. It could be a little different, I understand that could be the difference between field work but I don't want to leave you with the impression it is just 2 days.
ML	4 days, we need 3 days for the field work and 4 to do the placement of the radon canisters and _____ which we understand is a non-issue.
GB	_____ pick up the canisters.
NMW	Yep.
GB	Andy and Vic do you have anything you would like to add.
VC/AC	No I don't think we have anything further.
GB	Alright, thank you very much for your time. So what's gonna happen from here is I'll go back and over the next few days confer with Angela Carpenter and normal process is for a letter to be sent after that saying what the director has decided based upon the information that will be provided to her.
NMW	Very good. Question for you Gerry. Is there any more conferring between you and EPA staff or no this is the end of your...
GB	No there will be no...no. The director may talk to her staff but I will not talk to staff.
JD	
GB	When I've done this in the past it's just here's what happened and here's what I think. Here's what I think based upon what I've heard. In other words she will get the benefit of me listening for an hour to both parties present their case. Alright. Thank you very much for your time. Before you hang up. At some point once the director decides, if she decides to go ahead, there will be some notification as to whether the order is effective and what the effective date is. So then that triggers certain things. Yeah I think in the earlier orders it would have come from the director but now I think it is just here is the director's decision and then there is a subsequent notification as if the director opposed the order then the program would say okay it's now effective pursuant to paragraph 39 or wherever it is, notify us within a certain amount of days when you are in compliance.
NMW	Okay so the options are uphold the order, vacate the order or modify the order. So 3 options. Okay.
GB	Okay.
NMW	Very good, thank you very much for your time. Vic and Andy I'll call you afterwards.
VC/AC	Thank you.

